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Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-118

FRED J. KROPKE,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 22, 1972

OPINION BELOW

The opinion of the Court of Appeals is not yet reported. It affirmed a judgment of conviction of petitioner of conspiracy to extort in violation of 18 U.S.C. §1951, conspiracy to commit violation of 18 U.S.C. §371, and twenty-seven counts of substantive violations of 18 U.S.C. §1951. Petitioner was tried in the District Court by a jury and there is no opinion of that Court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 22, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Is the indictment in the instant case unconstitutionally vague by failing to apprise petitioner of the charges against him in that Count I charges him with conspiracy to extort from construction contractors of whom he had no knowledge by reason of his position or otherwise and Count II merely charges him with conspiracy to travel in interstate commerce to violate the laws of the State of New Jersey through bribery and extortion and attempted concealment of said conspiracy? Did such vagueness permit petitioner to be tried for an offense for which he was not indicted by a fatal variance between pleading and proofs at trial?

(2) Is the Third Circuit's approval of the Government's use of suppressed material on cross-examination improper and in direct conflict with the decision of the United States Supreme Court in *Agnello v. United States*, 269 U.S. 20 (1925) and an unwarranted extension of *Harris v. New York*, 421 U.S. 222 (1970) and *Walder v. United States*, 347 U.S. 62 (1954)?

(3) Did the Third Circuit Court, by approving the instructions to the jury by the trial court which removed the necessity for a finding of duress in order to convict under the Hobbs Act, 18 U.S.C., §1951, improperly overturn the interpretation of that Act which had been followed by all Circuits, including the Third Circuit, since its enactment?

(4) Should the indictment of defendant be dismissed where it was tainted by Grand Jury testimony of defendant compelled in violation of the Fifth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The Fourth, Fifth and Sixth Amendments to the Constitution of the United States of America and Sections 371, 1951 and 1952 of Title 18 U.S.C. are set forth in the Appendix at pages 42a et seq.

STATEMENT OF THE CASE

This matter involves the conviction of Fred Kropke and other defendants by the United States District Court which conviction was affirmed by the Third Circuit Court of Appeals. Prior to his indictment on October 8, 1970, the office of Fred Kropke in the Hudson County Police Headquarters was searched by agents from the United States Attorney's office. Simultaneously a raid was made on the office of Joseph Stapleton, the Hudson County Treasurer. The search warrants for these raids were based on an affidavit of Frederick B. Lacey, United States Attorney. Among the items seized were an envelope addressed to Philip Schuster, Warren Brothers, Plant Avenue, which contained $9,000 in one hundred dollar bills and certain Christmas Club Books belonging to John V. Kenny's family.

Thereafter, Fred Kropke was subpoenaed to appear before the Federal Grand Jury on October 13, 1970. He was not accompanied by counsel and was never told that he was a target of the investigation. He was not advised of the subject-matter of the investigation. At that time he was requested to sign a waiver of immunity, but refused to do so. No one explained the effect of such refusal. He was subsequently questioned extensively before the Grand Jury, including questions relating to the items seized in the search on October 8, 1970.

On November 16, 1970, Fred Kropke was indicted along with eleven co-defendants. The First Count of the Indictment charged conspiracy to extort money from construction contractors in violation of 18 U.S.C. §1951. The Second Count

charged violations of 18 U.S.C. §371 in that the defendants conspired to commit violations of 18 U.S.C. §1952, by travelling in and using the facilities of interstate commerce in furtherance of the crimes of extortion and bribery in violation of the laws of the State of New Jersey. No other objects of conspiracies or more definitive information were set forth. There were also 32 Counts charging substantive violation of 18 U.S.C. §1951.

Prior to trial, motions were made on behalf of Fred Kropke for discovery, Bill of Particulars, Suppression of Grand Jury Testimony and dismissal of the Indictment, and dismissal of Counts I and II of the Indictment on the grounds of vagueness.

On February 10th, the Trial Court heard these motions. Limited discovery was granted to each defendant, but all motions for a Bill of Particulars and to dismiss the Indictments or parts thereof were denied.

A motion to suppress the evidence obtained in the October 8th searches was filed. By letter dated April 19, 1971, the Government, rather than produce the Lacey affidavit, agreed to the suppression of the evidence and the fruits thereof seized from the defendants, Kropke and Stapleton. Importantly, when the affidavits were finally produced, it was found that not only was there no need to impound them, but that they were defective.

On May 17, 1972, the Trial commenced. The Government produced a multitude of witnesses who testified as to extortions and payoffs to City and County officials. The two main witnesses were John J. Kenny and Frank G. Manning, alleged participants who were given immunity and testified in detail as to a systems of extortion and payoffs in both the City and County governments. Neither of them attributed any role whatsoever to Fred Kropke in either system.

Another government witness, Samuel DiFeo testified that as a retail automobile dealer in Hudson County, he paid cash to John J. Kenny each time he sold a car to Hudson County, *T 2094*. There was also testimony involving the payment of money to Bernard Murphy and Thomas Flaherty on cars purchased by Jersey City, *T 2098* and *T 2101*.

Later DiFeo was allowed to testify over objection and in

spite of convenient memory lapses and changes of testimony, that he delivered a car to Mrs. Kropke and also billed Hudson County for the same car. The court denied defendant's motion to strike the latter testimony of DiFeo as being at variance with the indictment in that it related to neither construction contractors nor extortion or bribery, *T 2392.*

The next witness, Philip Schuster, President of Warren Brothers related payoffs to Wolfe and Manning on a contract with the State of New Jersey. He alluded to Fred Kropke as the person who attempted to return the money to him after his appearance before the grand jury.

Linda Roetman, the receptionist at Schuster's office, testified that on October 7, 1970, Fred Kropke came to the plant, asked for Mr. Schuster and said that he had tickets and change for him, *T 2662.*

The next series of witnesses, John Merrigan, James Dolan and David Muss testified at great length about the affairs and manipulations of Gerard Engineering Company. The testimony covered from *T 2687* to *T 3872.* Again, none of them mentioned Fred Kropke.

Following this, Gerard Brill and another witness testified to a series of transactions whereby co-defendant, John V. Kenny who had already been severed from the case, purchased a total of $700,000.00 in municipal and turnpike bonds, *T 4644.* Gerard Brill, a former vice president of Trust Company of New Jersey, testified that on two occasions Fred Kropke delivered to him an attache case containing money for two of the transactions, *T 4605, 4612.* There was no indication from the testimony that Fred Kropke had any knowledge of the contents of the attache cases.

On direct examination, Fred Kropke testified regarding the cars he purchased from Samuel DiFeo and his attempt at the request of Walter Wolfe to deliver to Philip Schuster tickets to the annual Hudson County Dinner and a money refund, *T 5087-5093.* He stated that to the best of his recollection, he delivered an attache case to Gerard Brill for John V. Ikenny on only one occasion, *T 5080.* He was also questioned about Christmas Club books which had been illegally seized from his office on October 8, 1970, and suppressed by the Court, *T 5413, 5418, 5419, 5420.* The first time any testimony about these items was brought out was on cross-examination.

Fred Kropke was found guilty by the jury on the first two counts and twenty-seven substantive (five counts having been dismissed on the government's motion), *T 6850-6852.* On August 10, 1971, he was sentenced by the Court to five years imprisonment, *Sentence T 88.*

From this sentence the defendant appealed to the Third Circuit Court of Appeals, which court affirmed the Judgment of the District Court. From this affirmance, defendant seeks Certiorari.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the administration of criminal justice in the Federal Courts. This court should rule on the specificity requirements of federal conspiracy indictments to insure that defendants in such actions are sufficiently apprised of the charges against them and are tried only for the offenses charged. This court should also clarify its ruling in *Harris v. New York,* 401 U.S. 222, as to the permissible use of illegally seized evidence to impeach a defendant's testimony; specifically, whether such evidence can be used to impeach testimony elicited by the Government on cross-examination in the light of the Supreme Court's decision in *Agnello v. United States,* 269 U.S. 20 (1925), denouncing such use.

The Third Circuit's acceptance of the removal of the necessity for a finding of duress to convict under 18 U.S.C. §1951 should be ruled on because of its striking divergence from the interpretation of the Act followed in all Circuits since its enactment.

Finally, because of the divergence of opinions in the various Circuits, this Court should decide whether an indictment tainted by the introduction of improperly compelled testimony before the Grand Jury should be dismissed or whether such testimony should merely be excluded from use at trial.

I. An indictment must sufficiently apprise a defendant of what charges he must be prepared to meet. *Hagner v. United States,* 285 U.S. 427 (1932). The Fifth Amendment entitles a defendant in a criminal case to be indicted for the offense for which he is tried, or to be tried only for the offense for which

he is under indictment. *United States v. Beard*, 436 F. 2d 1084 (5th Cir. 1971). The indictment in the present case violated the above rights of defendant Kropke in that it was so unconstitutionally vague that defendant was not sufficiently apprised of the charges against him nor tried for the offense for which indicted.

Count I of the Indictment alleges that the defendant Kropke conspired to obstruct, delay, impede and thwart construction on public projects in order to obtain the property of the contractors, with the consent of such persons having been induced both by the wrongful use of fear and under color of official right in violation of Section 1951 of Title 18 U.S.C.

Count II of the Indictment alleges in Paragraph 1 that the defendant Kropke conspired with others to commit certain offenses against the United States in that they would travel in interstate commerce, cause others to travel in interstate commerce and use the facilities of interstate commerce to promote the crimes of bribery and extortion in violation of the laws of New Jersey. Although 5 overt acts were set forth, they did not clarify the object of the conspiracy in any way nor limit the proofs that were admitted as evidence thereof.

Paragraph 2 of Count II purports to make acts of concealing the conspiracy a part thereof.

Neither Count I nor Count II contains any of the specific references to persons, places, dates, times or specific acts which would have apprised the defendant Kropke of the charges against him. Kropke's official position had nothing whatsoever to do with construction contractors. Count II of the Indictment did not even limit the class of persons from whom money was allegedly extorted. The additional charge in Count II that the defendants conspired to conceal the basic conspiracy was of no help in clarifying the essential element of every conspiracy indictment – the allegation of the object or objects of the conspiracy, *United States v. Falcone*, 311 U.S. 205 (1940); *United States v. Mathies*, 203 F. Supp. 797, 801 (W.D. Pa. 1962), – which object was overbroadly alleged in the charging language of the indictment here.

Because of the vagueness of the kind set forth, Counts I and II are inadequate in that they violate defendant's rights under the Fifth and Sixth Amendments of the Constitution of

the United States. *Russell v. United States*, 369 U.S. 749 (1962); *United States v. Quinn*, 365 F. 2d 256 (7th Cir. 1966). The Court in *Russell* discussed two of the criteria by which the sufficiency of an indictment is to be measured in that the indictment must contain the elements of the offense intended to be charged so as to sufficiently apprise the defendant of what he must be prepared to meet and to prevent possible double jeopardy.

At 770 the Court continued:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. (Citation omitted)"

It is submitted that the Indictment here has all the deficiencies condemned by the Court in *Russell*.

Furthermore, the allegations in the indictment were not specifically sufficient to guard against giving improper discretion to the court and the United States attorney to vary proofs at trial from the theory upon which the indictment was based. *United States v. Silverman*, 430 F. 2d 106, 110 (2d Cir. 1970) *cert denied* 402 U.S. 953 (1971) *reh den* 403 U.S. 924 (1971). The testimony of Samuel DiFeo which was the only testimony in the entire trial that attempted to involve Fred Kropke in performing anything but an innocent act, was admitted to the great prejudice of defendant Kropke because of the "improper discretion' referred to above.

The witness, Samuel DiFeo, first testified on May 31. 1971, that in the year 1969 he gave Fred Kropke a Datsun automobile and Captain Robbins an Oldsmobile for which he was paid the sum of $5,300 by voucher claim of the County of Hudson, *T 2194, 2105*. Two days later, after cross-examination, he changed his testimony to state that it was a 1969 Buick Electra ordered by Mrs. Kropke in October, 1968, which was paid for by the County of Hudson, *T 2285*. Even if full credibility were given to the nebulous testimony of

Samuel DiFeo, the allegations thereof are not within the purview of the Indictment.

Although the alleged acts, might constitute a crime under the State laws of New Jersey, they do not constitute extortion or bribery. There is also no po sible connection between this alleged incident and the alleged conspiracy among Fred Kropke and the named defendants and co-conspirators since the only persons allegedly involved are Samuel DiFeo, Captain Robbins, Fred Kropke and Mrs. Fred Kropke, his wife. Thus, permitting the jury to consider Samuel DiFeo's testimony constituted prejudicial error. The effect of such allegations only tended to prejudice Fred Kropke with the jurors and to draw their minds away from the real issue. *Boyd v. United States*, 142 U.S. 450 (1892).

The variation between pleading and proof "destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Stirone v. United States*, 361 U.S. 212, 217 (1960). See also *United States v. Critchley*, 353 F. 2d 358 (3d Cir. 1965); *United States v. Sutter*, 160 F. 2d 754 (7th Cir. 1947), wherein the Court said at 757:

> "In our view of the case, the evidence wholly fails to show that the defendant used his employment to extort, but shows rather that he used appealing causes to defraud. The statute in question does not cover such an offense. The motion for a directed verdict should have been granted."

A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. *Gaither v. United States*, 413 F. 2d 1061 (D.C. Cir. 1969) Even though the accepted rule is that a variance does not call for dismissal of the indictment except upon a showing of prejudice, *Gaither, supra*, it is submitted that such prejudice was present here. Furthermore, the variance here was substantial enough to amount to a constructive amendment of the indictment and should have been dismissed as it was in the case of *Stirone v. United States, supra*.

The Court of Appeals for the Third Circuit, in its opinion affirming the judgments below, indicated that the DiFeo

testimony was adequate proof of the charged conspiracy under the indictment based merely on the fact that defendant Kropke was a County official. *A 29a* It continued, however, by stating that even if the evidence could not be considered a part of the overall conspiracy charged, it was admissible as proof of motive, opportunity, intent, plan, knowledge and absence of mistake. At *A 30a*, the Circuit Court stated:

> "The appellants can hardly claim there was an abuse of such discretion when failing to object they never presented the issue to the district court."

The fact is that such objection was made, *T 2392*, and defense requested the court to give the proper limiting instructions, *Kropke's requests No. 18 and 20*, Appendix B, 41a, both of which were denied by the Court's statement:

> "I consider the language of the indictment, Count I in particular, sufficiently broad to embrace all the evidence."

Thus, the testimony of DiFeo was admitted as direct evidence of guilt on the conspiratorial charge although it was at variance with the indictment and operated as a constructive amendment thereof.

II. The Third Circuit's approval of the Government's use on cross-examination of suppressed material is in direct conflict with the decision of the United States Supreme Court in *Agnello v. United States*. 269 U.S. 20 (1925). On October 8, 1970, certain Christmas Club booklets belonging to co-defendant John V. Kenny and members of his family were seized in the office of Fred Kropke. Rather than submit to a motion to suppress, the Government agreed to their suppression. On his direct testimony the defendant Fred Kropke never mentioned these items. On cross-examination the Government over objection of defendant's counsel deliberately elicited testimony as to them, relying upon *Walder v. United States*, 347 U.S. 62 (1954) and *Harris v. New York*, 401 U.S. 222 (1970). The representation was made that the defendant had committed perjury, but an analysis of the transcript discloses that this was not so. The only thing that Fred Kropke had denied was bringing a briefcase to Gerard Brill twice; readily admitting that he had done so on one occasion. The second incident of alleged perjury was that on cross-examination Fred

Kropke stated that he had never been to the bank where his wife had her account. The Government immediately, over objection, used the suppressed material in an attempt to discredit him. The fact was that the account of his wife and the Christmas Club Accounts were in branches of the same bank in different cities. The Third Circuit refused to reverse, basing its refusal on the grounds that the testimony of the defendant was "substantially misleading" *Appendix 30a.*

In *Agnello*, the court reversed a conviction where evidence as to a can of cocaine which had been suppressed as having been seized in violation of the Fourth Amendment was introduced on cross examination. The Court stated at Page 35:

> "And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. In cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search. As said in *Silverthorne Lumber Co. v. United States*, 251 U.S. 392, 64 L. ed. 322, 24 A.L.R. 1426, 40 Sup. Ct. Rep. 182: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' The admission od evidence obtained by the search and seizure was error, and prejudicial to the substantial rights of Frank Agnello. The judgment against him must be set aside and a new trial awarded."

In *Walder v. United States*, supra, on direct examination the defendant stated that he had never possessed narcotics before. The Government was permitted in rebuttal to introduce evidence seized two years previously which had been suppressed. In *Harris v. New York*, supra, a statement obtained in technical violation of defendant's rights under the Fifth Amendment was used on cross-examination to contradict his direct testimony.

Walder and *Harris* can be reconciled with *Agnello* in that the latter only prohibits the use of suppresed material which is manufactured on cross-examination. The instant opinion by the Third Circuit completely obliterates this distinction. The decision further goes far beyond *Harris* which permits use of suppressed material to challenge perjury and extends its use to discredit misleading testimony. This decision makes the defendant's taking the stand to testify in his own behalf the only qualification for using suppressed material against him.

III. The Third Circuit in approving the instructions to the jury by the trial court which removed the necessity for a finding of some form of duress in order to convict under the Hobbs Act, Section 1951 Title 18 U.S.C. overturned the interpretation of that Act which had been followed in all Circuits, including the Third since the enactment of the Hobbs Act in 1948.

Title 18 U.S.C. §1951(b) (2) defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right".

The trial Court in instructing the jury as to this point stated at *T 6773:*

> "The term 'extortion' means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right."

It expanded further on this concept at *T 6774:*

> "Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accompanied by force, threats or use of fear. You will note that extortion as defined by Federal law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance the offense of extortion is committed."

Counsel for the defendant Kropke specifically objected to the trial Court's removal of the necessity of the element of duress to be found guilty under the Hobbs Act. Bribery, under these instructions, would be sufficient to sustain a conviction.

Since the enactment of the Hobbs Act in 1948, there has been no case in which the trial Court has not felt compelled to instruct the jury that it must find some form of duress. Even the Third Circuit Court as recently as September, 1971, in *United States v. Addonizio*, 451 F. 2d 49, 77 (3rd Cir. 1971), recognized duress as an element of extortion. It found that the court properly charged as to the mutual exclusivity of bribery and extortion by significantly including actual fear and compulsion as necessary elements of extortion. 451 F. 2d at 77-78. In the recent case of *United States v. Hyde*, 448 F. 2d 815 (5th Cir. 1971), the Court stated at p. 833:

> "It is the wrongful use of an otherwise valid power that converts dutiful action into extortion. If the purpose and effect are to intimidate others, forcing them to pay, the action constitutes extortion . . . The distinction from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim."

In contrast to the present decision by the Third Circuit, is *United States v. Kubacki*, 237 F. Supp. 638 (E. D. Pa. 1965), where the Court traced the legislative history of the Hobbs Act, and recognized that it had its origin in the New York Code. The Court then stated at p. 641:

> "In all the extortion cases cited by the Government, the victim was compelled to pay for the exercise or enjoyment of a right or privilege already his, under threat and out of fear that if he did not comply with the demands he would be subjected to unwarranted interference, with resulting substantial harm to his business or property rights.
>
> . . . .
>
> Under New York law, the crimes of bribery and extortion are mutually exclusive. One who pays a bribe is equally as guilty as the one who receives it, "which could never be the case with extortion." *People v. Dioguardi*, 8 N.Y. 2d 260, 273, 203 N.Y.S. 2d 870, 881, 168 N.E. 2d 683, 692 (1960). The court in Dioguardi noted the distinction between bribery and extortion, the essence of the one

being the voluntary giving of something of value to influence the performance of official duty, the essence of the other being duress. Applying that distinction to this case, the record is devoid of evidence of duress."

Finding that the facts as to Counts I and II in that case constituted bribery, the court held that the evidence was insufficient as a matter of law to sustain the extortion convictions and that defendants were entitled to acquittal on those Counts.

The Third Circuit in the case at bar disposes of this question in one paragraph. *A 39a,* citing for support of its decision *United States v. Nardello,* 393 U.S. 286, 289 (1969); *United States v. Sutter,* 160 F. 2d 754, 756 (7th Cir. 1947) and two New Jersey cases, interpreting the New Jersey extortion statute. Nardello, however, was an action under §1952 of Title 18 and did not involve public officials. *Sutter, supra,* also was not concerned with §1951, but with 18 U.S.C. §171 charging a federal employee with extortion. There the Court stated at 756:

"Under this statute, a Federal employee is guilty [of extortion] only if he uses his office to place another under compulsion of fear, force, or the undue exercise of power, so that such person parts with something of value unwillingly and involuntarily."

The Circuit Court in this case saw no need for such a requirement:

"The 'under color of official right' language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear or duress." A 39a.

It is submitted that the cases cited clearly disclose that Congress did not attempt to define extortion in terms of the common law. The additional statement of the Court in *United States v. Sutter, supra,* then becomes applicable.

"Congress did not see fit to define extortion in the terms known to the common law. It said that if an employee under color of his office *is guilty of*

extortion, he shall be punished. Therefore, extortion is used in its common, ordinary sense as distinguished from the sense in which it was know at common law.

Extortion is defined by Webster as the '***act or practice of taking or obtaining anything from a person by illegal use of fear, whether by force, threats or any other undue exercise of power***' Webster's New International Dictionary Second Edition, Unabridged, 1942.

Id at 756.

The Third Circuit has revolutionized the concept of the Hobbs Act in one paragraph of its opinion citing as support cases which are not applicable to the Statute. It is submitted that this question must be clarified by this Court because of the confusion which will result from future prosecutions under the Hobbs Act.

IV. The defendant, Fred J. Kropke, was issued a Subpoena to appear before the Federal Grand Jury, subsequent to the search of his office on October 8, 1971, to give testimony on behalf of the Government. He was not accompanied by counsel to the Grand Jury. He was never told that he was a target of the inevestigation. He was not told the subject matter of the investigation. He was requested to sign a waiver of immunity which he refused to do. No explanation of a waiver of immunity was given to him. After he refused to sign the waiver, no explanation was given to him as to what effect his refusal to sign had. He was questioned extensively including questions about material seized from his office and the office of a co-defendant, Joseph Stapleton.

It is submitted that the testimony of Fred Kropke was compelled in violation of his Fifth Amendment rights. *Jones v. United States,* 342 F. 2d 863 (D.C. Cir. 1964); *United States v. Edgerton,* 80 F. 374 (D. Mont. 1867); *State v. Sarcone,* 96 N.J. Super. 501 (L. Div. 1967).

It is contended that on the facts of this case the proper remedy is dismissal of the Indictment. Kropke was a peripheral defendant in a multiple conspiracy case. The only allegation of his active wrongdoing was contained in the testimony of Samuel DiFeo which in no way could have brought about the

Indictment because it allegedly was not known to the Government until after the commencement of the trial, *T 2110, 2111.* The remaining allegations of the defendant's participation concerned the doing of ministerial acts, specifically, delivery of a brief case to Gerard Brill, *T 4606, 4612;* and attempted delivery of tickets and money to Philip Schuster *T 2438.* It is, therefore, apparent that Kropke's testimony was the substantial factor in the return of the Indictment against himself.

Considering the totality of the circumstances, it is submitted that dismissal of the Indictment and not mere exclusion of tainted testimony is the only proper remedy here. *Jones v. United States, supra; United States v. DiGrazia,* 213 F. Supp. 232 (N.D. Ill. 1963); *Lawn v. United States,* 115 F. Supp. 674 (S.D.N.Y. 1953). It is not claimed that the violations of the rights of Fred Kropke present a complete bar to his prosecution, only that he does have the right to have a Grand Jury decide whether or not to indict him without substantial reliance on his compelled testimony.

The Third Circuit failed to direct itself to this issue. Instead it made reference to the illegal search of the offices of various defendants and relied on the general, and far too broad, proposition that a defendant may not challenge an indictment on the ground that illegally obtained evidence was presented to the Grand Jury. *Costello v. United States,* 350 U.S. 359 (1956) (use of hearsay evidence); *United States v. Lawn,* 355 U.S. 339 (1968) (mere suspicion without foundation of use of prior compelled testimony before a different Grand Jury); *United States v. Blue,* 384 U.S. 251 (1966) (no finding that the allegedly tainted evidence was presented to the Grand Jury). The Third Circuit neglected to consider *Jones v. United States, supra,* and the decision in the instant case is in conflict with the D.C. Circuit decision in *Jones.* Additionally in relying on *United States v. Lawn,* 355 U.S. 339 (1966), the Third Circuit failed to recognize that the initial indictment in that case was dismissed because of the compelled Grand Jury testimony of the defendants, the same grounds advanced at this time. *Lawn v. United States,* 115 F. Supp. 674 (S.D.N.Y., 1953).

The question presented, whether an indictment substan-

tially procured through illegally compelled Grand Jury testimony of the defendant should be dismissed, has not been decided by the Supreme Court.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 71-1886, 71-1887, 71-1888,
71-1889 and 71-1890

UNITED STATES OF AMERICA

v.

JOHN V. KENNY, THOMAS WHELAN, THOMAS FLAHERTY, WALTER WOLFE, JOHN J. KENNY, WILLIAM STERNKOPF, JR., FRED KROPKE, FRANK G. MANNING, JOSEPH STAPLETON, PHILIP KUNZ, JAMES R. CORRADO, BERNARD MURPHY

WILLIAM A. STERNKOPF, JR.,
Appellant in No. 71-1886

FRED J. KROPKE,
Appellant in No. 71-1887

JOSEPH B. STAPLETON,
Appellant in No. 71-1888

PHILIP W. KUNZ,
Appellant in No. 71-1889

BERNARD MURPHY,
Appelalnt in No. 71-1890

(D.C. Criminal No. 570-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued February 18, 1972

Before VAN DUSEN, ADAMS and GIBBONS,
Circuit Judges

OPINION OF THE COURT

(Filed May 22, 1972)

GIBBONS, *Circuit Judge.*

On November 16, 1970 a federal grand jury in Newark returned a thirty-four count indictment against John V. Kenny, Thomas Whelan, Thomas Flaherty, Walter Wolfe, John J. Kenny, William Sternkopf, Jr., Fred Kropke, Frank G. Manning, Joseph Stapleton, Philip Kunz, James R. Corrado and Bernard Murphy. Prior to trial the defendants Frank G. Manning, and John J. Kenny (no relation to John V. Kenny and called hereinafter J. J. Kenny) were severed and were granted immunity pursuant to 18 U.S.C. §2514. Corrado pleaded guilty to one count on May 21, 1971. During the trial, on June 11, 1971 John V. Kenny (hereinafter J. V. Kenny), because of physical inability to continue, was severed. At the close of the Government's case five counts of the indictment were dismissed on the motion of the Government. On July 5, 1971, the jury returned verdicts of guilty against seven of the eight remaining defendants on all twenty-nine remaining counts and against defendant Kunz on seventeen of those counts. Sentences were imposed on August 10, 1971[1] and all defendants except Wolfe appealed. Thereafter the defendants Whelan and Flaherty withdrew their appeals. Thus of the twelve named in the indictment the appeals of five, Sternkopf, Kropke, Stapleton, Kunz and Murphy, are before us.

Count I of the indictment charges that each of the

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[1] The court sentenced defendants Whelan, Flaherty and Murphy to terms of fifteen years imprisonment; defendant Sternkopf to a term of ten years imprisonment and a fine of $20,000; defendant Kropke to a term of five years imprisonment; defendant Stapleton to a term of two years imprisonment with eighteen months of that term suspended and three years probation; defendant Kunz to a term of two years imprisonment with eighteen months of that term suspended and two years probation; defendant Wolfe to a term of five years imprisonment with the entire term suspended and five years probation.

defendants, during the period from November 1, 1963 to the date of the indictment, conspired in violation of 18 U.S.C. §1951[2] to obstruct, delay, and affect interstate commerce by impeding construction undertaken on behalf of the City of Jersey City and the County of Hudson by contractors engaged in interstate commerce, in order to obtain the property of such contractors with their consent, which was induced both by the wrongful use of fear and under color of official right. Count II of the indictment charges that each of the defendants, during the period from November 1, 1963 to November 16, 1970, in violation of 18 U.S.C. §371[3] conspired to commit violations of 18 U.S.C.

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[2] "Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

[3] "Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

§1952[4] by using the facilities of interstate commerce to carry on an unlawful activity, that activity being the crimes of bribery and extortion in violation of the laws of the State of New Jersey. Thus the indictment charges violations of two separate federal conspiracy statutes; the specific prohibition in §1952 against conspiracies to obstruct, delay or affect commerce (Count I) and the general prohibition in §371 against conspiracies to commit an offense against the United States (Count II). The offense alleged against the United States in Count II is the substantive violation of §1952—interstate travel to commit extortion or bribery in violation of state law. Section 1952, unlike §1951, does not contain a specific prohibition against conspiracy. Section 1951 prohibits both substantive offenses and conspiracies. Counts III through XXXIV of the indictment each charges a separate substantive violation of §1951 by the extortion of a specific sum of money from a specific contractor.

Each of the defendants was, or had been, a highly placed public official or political leader in Jersey City or Hudson County or both. It was the federal government's theory that each acting in concert with one or more of the others used

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[4] "Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime or violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

his position to fasten upon both the city and county administrations a system whereby no one could do business with either without kicking back a percentage, usually 10%, of the contract price. According to the federal government this was achieved in three principal ways. First, the competitive bidding process was perverted by a "pre-qualification" arrangement which enabled the defendants to exclude from bidding contractors unwilling to kick back. Second, payments for work already done would be withheld until the kickback was made. Finally, on contracts not subject to competitive bidding the contract would not be awarded to anyone unwilling to kick back. At the head of this corrupt system, according to the federal government, was the defendant J. V. Kenny, who, although he held no public office or official party position in the years in question, was de facto the absolute boss of the political party in power. Under his leadership, it was contended, the defendants fastened a thoroughly meshed arrangement on both city and county administrations by which they subverted those governmental units into corrupt vehicles for their own private enrichment.

These contentions were amply proved by the testimony of numerous witnesses, but particularly by the testimony of the two defendants, Manning and J. J. Kenny, who as immunized witnesses detailed their own participation in the corrupt system, its methods of operation, its pervasiveness, and its long term success. The testimony of these acknowledged participants was corroborated in detail not only by the testimony of numerous victims, but by proof of the existence of substantial hoards of ill gotten gains accumulated by one or more of the participants. The proof in the record of the existence of a system for diverting the apparatus of city and county government to private, unlawful ends is overwhelming.

Each of the appellants, however, contends that as to him the proof was not all that overwhelming, that the government's case placed him at the periphery at best, and that he was prejudiced before or during the trial in various

ways. Most of the appellants urge common legal and factual issues, and these will be so discussed. Where the situation of any appellant is unique specific reference will be made to him.

I. Contentions with Respect to Discovery of the Government's Case

All defendants engaged in extensive pre-trial motion practice looking to discovery of the Government's case. That case was substantially documentary. The court ordered the Government, on defendant's motion, to permit them to inspect all tangible evidence related in any way to the case, to furnish in advance copies of any records which the Government might use at the trial and to furnish a copy of the grand jury testimony of each defendant who had testified before the grand jury. As it turned out, there was a room full of documents. This room was kept open to the defendants six days a week prior to the trial and even on Sunday during the trial. Several of the defendants contend that the court's approach was so overly liberal that they never made any meaningful use of the vast volume of materials made available. This contention is without substance. The nature of the conspiracy was such that it generated a great deal of tangible evidence, including $50,090.00 in currency, all of which was available for inspection. The only evidence which was not, pursuant to the court's order, available for inspection prior to trial, was evidence of certain transactions which did not come to the Government's attention until the trial was under way. The court gave the defendants an adequate opportunity during trial to prepare to meet any such later discovered evidence.

Several defendants contend that the court erred in denying their motion for a bill of particulars. The court in the exercise of its sound discretion declined to require the Government to answer a set of detailed interrogatories in the guise of a bill of particulars. This decision to permit liberal inspection of all tangible evidence placed a greater

burden of preparation on the defendants than would have been the case had their suggested course, requiring answers to a detailed bill of particulars, been followed. This, however, was a matter within the discretion of the court. The court leaned heavily toward liberal discovery throughout the case, and the defendants cannot be heard to complain about the balance of the burden of preparation which it struck between the prosecution and the defense. Ample opportunity for preparation was available, and from the evidence in the record was in fact availed of.

Defendant Stapleton contends that the court erred in denying his motion, pursuant to Fed. R. Crim. P. 16(a), for a copy of the statements of Government witnesses setting forth conversations with him. We rejected the same contention in *United States v. Fioravante*, 412 F.2d 407, 410 (3d Cir. 1969), *cert. denied*, 396 U.S. 837 (1969). Rule 16(a) does not require the discovery of witness statements. Those statements are governed by the provisions of the Jencks Act, 18 U.S.C. §3500. That statute was complied with during the trial.

Finally, defendants Kropke and Stapleton contend that it was error for the court to refuse discovery, prior to trial, of the contents of affidavits used to support the issuance of search warrants on October 8, 1971. The affidavit was on the Government's motion impounded in the interest of justice. The warrants directed the search of their offices. The defendants sought its inspection in connection with a proposed motion to suppress the fruits of the search. In response the United States Attorney urged that the motion to suppress be deferred until trial. He agreed to produce the affidavit at trial and represented that the Government would not object to the timeliness of the suppression motion at that time. Nevertheless Kropke and Stapleton made motions, pursuant to Fed. R. Crim. P. 41(e), for suppression. In response to these motions the United States Attorney stipulated that the Government would make no use of the materials seized in the search in its affirmative case at the

trial. In effect the Government, rather than disclose the contents of the affidavits, consented to the suppression motion. In these circumstances the court refused to permit pre-trial inspection of the affidavits.

Stapleton and Kropke contend, nevertheless, that they were prejudiced by the use of the seized evidence before the grand jury. But a defendant may not challenge an indictment on the ground that illegally obtained evidence was presented to the grand jury. *United States v. Blue*, 384 U.S. 251 (1966); *United States v. Lawn*, 355 U.S. 339 (1968); *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Rundle*, 383 F.2d 421, 424 (3d Cir. 1967), *cert. denied*, 393 U.S. 863 (1968); *United States v. Grosso*, 358, F.2d 154, 163 (3d Cir. 1966); *rev'd on other grounds*, 390 U.S. 62 (1968). Stapleton and Kropke urge that the rule of these cases was changed by our decision in *In Re Grand Jury Proceedings, Harrisburg, Pennsylvania*, 450 F.2d 199 (3d Cir. 1971), *cert. granted*, 40 U.S.L.W. 3279 (U.S. Dec. 14, 1971). That case turns on the provisions of a specific statute, 18 U.S.C. §§2514, 2515, and involves the standing of a witness, in that capacity, to refuse to testify before a grand jury. That issue is not presented in this record. Nothing in the *Harrisburg Grand Jury* case reflects upon the continuing validity of the rule of *Blue*, *Lawn* and *Costello* that a defendant cannot challenge an indictment on the ground that it was based on illegally obtained evidence.

In connection with the search warrant contentions of Stapleton and Kropke the federal Government makes the additional point that its consent to the suppression motion was not an acknowledgement that the affidavits were insufficient. The consent was made solely for the purpose of avoiding a revelation of the identity of a potential witness. It urges that an examination of the affidavits will disclose compliance with the formula set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964), explained in *Spinelli v. United States*, 393 U.S. 410 (1969) and possibly contracted in *United States v. Harris*, 403 U.S. 573 (1971). Because we

hold that *Blue*, *Lawn* and *Costello* control we do not reach that contention. At a later point we will discuss the use which was made at the trial of the materials seized pursuant to the warrants.[5]

II. Contentions Addressed to the Indictment

The appellants make a series of contentions addressed to the form of the indictment, the claimed variance of the proofs from the charge and the joinder of issues and parties. These may be categorized under the headings of vagueness, duplicity, variance and prejudicial joinder.

Vagueness

Sternkopf and Kropke urge that Count II of the indictment is vague as to contravene both the fifth and the sixth amendments. Kropke also contends that Count I is unconstitutionally vague. All the appellants have joined in these contentions.

The attack upon Count I requires no prolonged discussion. It is identical in all material respects with that approved in *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 40 U.S.L.W. 3395 (U.S. Feb. 22, 1972). Count II charges that the defendants:

> ". . . did knowingly . . . conspire . . . with each other, and with other persons . . . to commit certain offenses . . . in violation of Section 1952 of Title 18 . . . in that the defendants and said co-conspirators would travel and wilfully cause others to travel in interstate commerce and that they would use and wilfully cause others to use the facilities in interstate commerce . . . to promote, manage, establish and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activing being the crimes of bribery and extortion in violation of the laws of the State of New Jersey, and it was further part of said conspiracy that the defendants

[5] *See* pp. 38, 39, 44 to 46 *infra*.

would thereafter perform and cause others to perform acts of promoting . . . of said unlawful activity and acts facilitating the promoting . . . of said unlaw activity."

Section 1952 in relevant part reads:

"(a) Whoever travels in . . . or uses any facility in interstate . . . commerce . . . with intent to —

* * *

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any acts specified in [subparagraph] . . . (3) shall be fined . . . or imprisoned . . .

(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery or arson in violation of the laws of the State in which committed . . ."

A substantive violation of §1952(a)(3) thus requires proof of interstate travel or use of interstate facilities with intent to promote extortion or bribery followed by attempts to perform such extortion or bribery. The indictment alleges all elements of this substantive offense in the language of §1952. It charges a conspiracy to violate that section between November 1, 1963 and the date of the indictment, and it alleges further that part of the conspiracy was the performance of other acts for the purpose of concealment.

Appellants contend that this indictment was so vague that it permitted the federal government to prove any extortion or bribery participated in by the alleged conspirators in violation of New Jersey law in the specified time period. This, they contend left the prosecutor free to prove offenses which had never been considered by the grand jury, thereby violating the fifth amendment guarantee that an accused charged with a serious crime be tried only on an indictment of a grand jury. They contend, moreover, that Count II did not set forth a "plain, concise and definite written statement of the essential facts constituting the

offense charged," Fed. R. Crim. P. 7(c), and thus violated their sixth amendment guarantee that they be informed of the "nature and cause of the accusation."

We hold that Count II complied with the standards set forth in *Hagner v. United States*, 285 U.S. 427, 431 (1932) and *Wong Tai v. United States*, 273 U.S. 77, 81 (1927). *See United States v. Dreer*, No. 71-1514 (3d Cir., filed Mar. 9, 1972). It charges the statutory crime in the language of the statute. It specifies the time period during which the conspirators are claimed to have acted. It both apprises the appellants of the charges against them and protects them against any future double jeopardy. *See United States v. Dreer, supra; United States v. Addonizio, supra; Vandersee v. United States*, 321 F.2d 57 (3d Cir. 1963); *United States v. Palmiotti*, 254 F.2d 491, 495 (2d Cir. 1958); *United States v. Achtner*, 144 F.2d 49, 51 (2d Cir. 1944). In affording such protection the indictment in this case differs crucially from that found defective in *United States v. Raysor*, 294 F.2d 563 (3d Cir. 1961). The contention that it permitted the proof of offenses not permitted to the grand jury is without substance. The federal government was required to offer to the grand jury some proof of the ongoing conspiracy alleged in Count II. It was not required to offer proof of every violation of New Jersey law which occurred as a result of that ongoing conspiracy. Evidence of some such violations did not come to the attention of the prosecuting authorities until after the indictment was returned. This evidence was, however, probative of the overall continuing conspiracy which the grand jury charged. Thus this case is not at all like *Stirone v. United States*, 361 U.S. 212 (1960), in which the grand jury charged a specific substantive interference with interstate commerce and the government proved a different substantive interference. Indeed the form of the indictment was compelled by the nature of the conspiracy. It was a conspiracy to exact a toll from everyone who could be made amenable to such an exaction by virtue of the defendants' control of the administrative apparatus

of local government. It is entirely likely that neither the grand jury nor the federal prosecuting authorities have not to this day discovered every instance of bribery or extortion by the conspirators in violation of New Jersey law. But the conspiracy to violate §1952 during the specified period was charged and was proved. The appellants cannot again be put in jeopardy for the same conspiracy even if new instances of violations of the New Jersey bribery and extortion laws in the same time period should now be discovered.

Duplicity

Appellants urge that because the federal government's position at all times was that there was a single overall conspiracy they were prejudicial by the fact that they were charged with two separate conspiracy counts. The maximum sentence under §1951 is twenty years, and none of the defendants received a sentence in excess of twenty years. A single general sentence was imposed. Since each sentence was less than the maximum permitted under §1951 the judgment should be upheld if conviction on the §1951 count is sustainable. *Barenblatt v. United States*, 360 U.S. 109, 115 (1959); *Roviaro v. United States*, 353 U.S. 53, 55-56 (1957); *Whitfield v. Ohio*, 297 U.S. 431, 438 (1936); *Claassen v. United States*, 142 U.S. 140, 147 (1891); *Peoples v. United States*, 412 F.2d 5 (8th Cir. 1969) and cases cited therein.

We need not rest affirmance on that ground alone, however. The single overall conspiracy violated two separate federal statutes prohibiting conspiracies. Count I charges a violation of the conspiracy prohibition in 18 U.S.C. §1951—conspiracy to interfere with interstate commerce. Count II charges a violation of the general federal conspiracy statute in 18 U.S.C. §371—conspiracy to violate a federal statute, in this case 18 U.S.C. §1952, by conspiring to use the facilities of interstate commerce to violate state law. Count I required proof of interference with interstate commerce by extortion. Count II required proof of use of the facilities of

interstate commerce. So long as each required proof of a fact not essential to the other, even though the charges arose from a single act or series of acts, or as here a single conspiracy, the defendants could be convicted of both. *Pereira v. United States*, 347 U.S. 1, 9 (1954); *United States v. Beacon Brass Co.*, 344 U.S. 43, 45 (1952); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Noveck*, 273 U.S. 202, 206 (1927); *Gavieres v. United States*, 220 U.S. 338 (1911); *United States v. Samuel Dunkel & Co.*, 184 F.2d 894 (2d Cir. 1950), *cert. denied*, 340 U.S. 930 (1951); *cf. United States v. Caci*, 401 F.2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969). Separate federal interests were invaded by the separate violation of two conspiracy statutes by a single conspiracy. *See American Tobacco Co. v. United States, supra* at 787.

Moreover each of these statutes permits a different range of sentence.[6] It was proper to charge both violations as separate counts of the indictment.

Variance

The appellants contend that their convictions should be reversed because of a fatal variance between the proofs adduced at trial and the indictment. To put this argument in perspective it must be recalled that in addition to the two conspiracy counts the indictment alleged thirty-two separate substantive counts charging separate extortive transactions with interstate contractors or suppliers in violation of 18 U.S.C. §1951. Evidence was offered tending to prove twenty seven of these counts, and most of that evidence tended to show concert of action between one or more of the defendants and hence to prove Count I. Evidence was offered with respect to many of these same transactions tending to prove that one or more of the defendants acting in concert caused

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[6] Not more than twenty years and not more than $10,000 under 18 U.S.C. §1951; not more than five years and not more than $10,000 under 18 U.S.C. §371.

the facilities of interstate commerce to be used in furtherance of the extortion, and hence to prove Count II. Thus this is not a case where there was no evidence of the existence of a conspiracy. *Compare United States v. DeCavalcante*, 440 F.2d 1264 (3d Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3221 (U.S. Nov. 9, 1971). The appellants claim, however, that although there was ample proof of concert of action, and ample proof of substantive violations of 18 U.S.C. §1951, and ample proof of use of the facilities of interstate commerce, and ample proof of bribery and extortion in violation of New Jersey law, the Government in fact proved several separate unrelated conspiracies under each conspiracy count. They argue that the proof established a Jersey City conspiracy to extort from contractors, a separate Jersey City conspiracy to extort from gamblers, a Hudson County conspiracy to extort from contractors, a separate conspiracy to extort from J. Rich Steers Company in connection with a Port of New York Authority contract, and a separate conspiracy to extort from Di Feo Motors. They urge that it was improper to lump together in one indictment several conspiracies, *Kotteakos v. United States*, 328 U.S. 750 (1946), and that by permitting proof of separate conspiracies the court permitted the Government to amend the indictment without resubmission to the grand jury. *Russell v. United States*, 369 U.S. 749 (1962).

Kotteakos prohibits charging multiple unrelated conspiracies, but it does not prohibit charging one master conspiracy and establishing at trial that under the master conspiracy more than one subsidiary scheme was involved. *Blumenthal v. United States*, 332 U.S. 539 (1947). Explaining *Kotteakos* in *Blumenthal* Justice Rutledge wrote:

> "Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement

> with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single over-all comprehensive plan." 332 U.S. at 558.

Here there is ample evidence of a large general scheme, and of aid given by some conspirators to others in aid of that scheme. Each of the appellants was connected by evidence to the large general scheme. At the head of the scheme was J. V. Kenny who, the evidence suggests, ruled the political life of both city and county. Each of the remaining defendants held an official position in city or county government as a result of membership in J. V. Kenny's organization. He effectively determined who would hold public office in either government and he organized a system to insure that all contractors working on a public project would kickback a percentage of the contract price to a designated bagman. Generally speaking members of the city government would collect kickbacks from city contractors and members of the county government would collect from county contractors. But the roles played by various conspirators varied from time to time. Thus city collector Murphy was at one point replaced by Manning, who in turn was replaced by Flaherty. County collector Schlosberg was at his death replaced by J. J. Kenny, who was in turn replaced, after a falling out with J. V. Kenny, by Manning, who was eventually replaced by Wolfe. Manning, as County Engineer on occasion collected from firms which were performing city work. J. J. Kenny, a County Freeholder, on occasion collected from firms which were performing city work. The pattern of conduct reflected in the evidence is that of a determined group who repeatedly cooperated closely to achieve the common purpose of self-enrichment by extracting kickbacks. The key to success of all their depravities was their common control over the administration of city and county government under the leadership of J. V. Kenny. Without detailing all of the transactions, evidence about Ashland Oil Company, the subject of one of the substantive counts, discloses the typical

common ingredients. J. V. Kenny ordered the extortion; Sternkopf made the original demand. Sternkopf recruited Manning to make the collection, and Manning collected the money and turned it over to Wolfe. When the conspirators learned that Schuster, an Ashland employee, was appearing before the federal grand jury, Wolfe gave cash to Kropke to return to Schuster. Kropke attempted to do so but could not reach Schuster. He then returned the cash to Wolfe who returned it to Stapleton.

Manning and J. J. Kenny, the immunized co-conspirators, described the "system" or "official family" and the role of each defendant in it. It is clear from the evidence that none of the so called separate conspiracies could have operated except for the existence of the overall conspiracy charged by the grand jury. The court clearly charged that each defendant had to be connected with this overall conspiracy. This case is like *Blumenthal v. United States, supra,* rather than like *Kotteakos v. United States, supra,* upon which appellants rely.

Prejudicial Joinder

The appellants urge that the joinder Counts I and II of the indictment was improper under Fed. R. Crim. P. 8(a) and that the joinder of defendants was improper under Fed. R. Crim. P. 8(b). They contend that the district court erred in denying their Rule 14 motions for severance of offenses and for separate trials. These severance claims are predicated chiefly upon the allegedly prejudical effect of evidence admitted against some defendants which in the view of one or more of the appellants was inadmissible against him. Kunz and Kropke further contend that since they played only a minor part in the conspiracy their severance should have been ordered. We find no abuse of discretion. *United States v. Weber,* 437 F.2d 327, 331-32, 340 (3d Cir. 1970), *cert. denied,* 402 U.S. 932 (1971); *United States v. Barrow,* 363 F.2d 62, (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967).

The evidence on the two conspiracy counts was essentially the same. The difference between them was that for Count I the government had to establish effect on interstate commerce while in the other it had to establish use of the facilities of interstate commerce. No possible prejudice arose from such evidence. It is true that Count II permitted greater latitude in proving substantive offenses against New Jersey law, since, if use of the facilities of interstate commerce was shown the Government could, and did, prove extortion from persons engaged in activities essentially intrastate. But the extortions in question were of the same character and grew out of the same overall conspiracy. Each involved misuse of the instrumentalities of government upon which the conspirators had fastened themselves. It was, therefore, no abuse of discretion to deny the motions to sever Counts I and II.

We turn, then, to the contention that some of the appellants should have been granted separate trials because of the prejudicial effect of evidence admitted against others which would be inadmissible against them. For two reasons we reject this contention. First, the mere possibility that in a joint trial some evidence may be admitted against one defendant which is inadmissible against another is not in itself a sufficient reason for multiple trials growing out of a closely related series of transactions. The prospect that certain evidence will be admissible against one defendant but not against another is a feature of all joint trials. Fed. R. Crim. P. 8 recognizes that this is a possibility, and Rule 14 commits to the sound discretion of the trial court the balancing of the inconvenience to the Government and the judicial process of numerous separate trials against the inconvenience to the defendants of seeking appropriate limiting instructions. *See, e.g., United States v. Barber*, 442 F.2d 517, 529 (3d Cir. 1971), *cert. denied*, 404 U.S. 958 (1971). There is no abuse of this discretion in the instant case. Second, the granting of separate trials would not have significantly benefited the defendants who now complain.

They would not have been able to compel self incriminating testimony of those co-defendants who in this trial declined to testify. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). *See generally United States v. Housing Foundation of America*, 176 F.2d 665 (3d Cir. 1949). There was some evidence linking each defendant to the conspiracy. *See United States v. Cohen*, 197 F.2d 26 (3d Cir. 1952). Thus the evidence of acts of all the co-conspirators in furtherance thereof would be admissible against them. *See, e.g., United States v. Weber, supra; Baker v. United States*, 401 F.2d 958, 974 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970); *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964).

The real thrust of the appellants' objections to their joint trial is that the rules of evidence pertaining to conspiracy trials operated harshly, particularly because the out-of-court declarations of each co-conspirator became admissible against each other co-conspirator. We are, of course, mindful of the dangers of unfair guilt by association involved in the law of criminal conspiracy. In the instant case, however, there was evidence linking each of the appellants to the conspiracy, although in varying levels of participation.[6a] In these circumstances, the evidence rules applicable to conspiracy trials did not operate unfairly. Indeed, this case illustrates the pervasive danger to the community of conspiratorial associations and thus hardly presents a sympathetic vehicle for the reconsideration of the co-conspirator admissions rule, even if we, as opposed to a higher authority, were free to change that rule.

III. Contentions Addressed to Admissibility of Evidence in the Government's Case

All the appellants complain about various items of evidence admitted during the Government's case. Much of

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[6a] These degrees of participation were recognized in the varying sentences imposed. *See* Note 1 *supra*.

the evidence consisted of shocking revelations by the two immunized co-conspirator defendants, J. J. Kenny and Manning.

A. Evidence of Concealed Wealth

Among the more sensational items of evidence were those establishing the existence of large concealed wealth in the possession or control of one or more of the alleged conspirators. The court admitted in evidence $700,000 in bearer bonds belonging to J. V. Kenny. It admitted evidence of a secret numbered bank account in Miami, Florida, controlled by Whelan and Flaherty, containing $1.2 million. It admitted in evidence $50,090.00 in currency which was given by J. V. Kenny to J. J. Kenny in February 1971, after the indictment, for the purpose of "investigating" and "discrediting" Manning, who by then was suspected of being a potential witness. It admitted testimony that Sternkopf assisted J. J. Kenny to invest substantial funds which the Government contends were proceeds of the crimes charged.

Appellants urge, on the authority of *Williams v. United States*, 168 U.S. 382 (1897) that all the foregoing evidence was improperly admitted because no connection was shown between the possession by the defendants of the sums specified and the extortions for which they were indicted. We have held that sudden unexplained acquisition of wealth at or about the time of the offense charged establishes a sufficient nexus to satisfy the rule of *Williams*, *supra*. *See United States v. Chaney*, 446 F.2d 571 (3d Cir. 1971); *United States v. Jackson*, 403 F.2d 647, 649 (3d Cir. 1968), *cert. denied*, 394 U.S. 949 (1969); *United States v. Howell*, 240 F.2d 149, 158 (3d Cir. 1956). We have also held that evidence of a desire to conceal a large sum of money shortly after a crime sufficiently establishes the connection required by *Williams*. *United States v. McKenzie*, 414 F.2d 808 (3d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970). *See also United States v. Jackskion*, 102 F.2d 683 (2d Cir.), *cert. denied*, 307 U.S. 635 (1939); *Commonwealth v. Mulrey*, 170 Mass. 103, 49 N.E. 91 (1898). Measured by the rules

which this circuit has followed there was in each of the four instances complained of sufficient evidence connecting the money to the conspiracy.

(1) The J. V. Kenny Bonds

J. V. Kenny arranged during the pendency of the charged conspiracies surreptitious transfers of currency for the acquisition of bonds, through the Trust Company of New Jersey, utilizing the services of Kropke and Sternkopf. Brill, an officer of the Trust Company of New Jersey, testified that Sternkopf called him on the telephone to arrange for the purchase of $200,000 worth of New Jersey Turnpike Bonds. Sternkopf told Brill that a representative of J. V. Kenny would arrange for payment. On October 4, 1966 Kropke brought to the bank $200,870.84 in currency. J. V. Kenny later personally picked up the bonds from Brill after they were delivered to the bank by Lehman Brothers, the underwriter. An official of Lehman Brothers, Ragsdale, testified that after the purchase he had a conversation with Sternkopf in which Sternkopf expressed extreme displeasure over the fact that Lehman Brothers put J. V. Kenny's name on the bill. Sternkopf directed Lehman Brothers "never to put John V. Kenny's name on any such bill" in the future. In May, 1967, J. V. Kenny decided to purchase $200,000 worth of City of New York bonds. Kropke brought Brill $200,000 in currency. After receipt of the bonds from New York Brill personally delivered the bonds to J. V. Kenny at Corrado's office in Pollak Hospital. In April, 1968, Sternkopf telephoned Brill regarding the purchase of $100,000.00 of County of Loran, Ohio, bonds. Brill went to Sternkopf's office, and Sternkopf gave him $102,365.97 in currency, Brill delivered the bonds to Sternkopf. In July 1968 Sternkopf again called Brill and arranged for the purchase of $200,000 worth of New Jersey Turnpike bonds. Brill arranged for the delivery of the bonds from New York and delivered them personally to Sternkopf, receiving $200,000 from him in currency.

Brill testified that all the bonds were "bearer bonds",

that all were delivered from New York (as charged in Count II), that in each instance the Trust Company of New Jersey as agent for J. V. Kenny paid for the bonds by a bank treasurer's check, thus concealing the fact that J. V. Kenny had available for such purchases during the period when the conspiracy was operating over $700,000 in currency. There was evidence that all kickbacks were made in currency. These transactions were amply connected to the conspiracy. *United States v. McKenzie, supra; United States v. Jackskion, supra.* They were evidential of the knowledge and participation of Kropke and Sternkopf in that conspiracy. *United States v. Addonizio,* 449 F.2d 100, 102 (3d Cir. 1971); *United States v. Barrow,* 363 F.2d 62 (3d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967).

(2) The Whelan and Flaherty Accounts

The immunized defendant, Manning, testified:

"Q. Did you ever have any conversation with defendant Flaherty in reference to any of the proceeds of the contractors' envelopes?

A. Yes, sir, I did.

* * *

Q. In substance what did the defendant Flaherty say to you and what did you say to him?

A. He and Mayor Whelan were very disturbed about the opposition on the Hill, referring to the County organization, that they think we are stupid. They are the stupid ones. They stashed their cash in local banks. He said that we put ours in the bank owned by a friend of mine outside the State. (Tr. 3985)."

Later in the trial Dennis Clum, senior Vice President in charge of the Trust Department of the Miami Beach First National Bank testified that James Rogers of that bank, formerly an officer of the First National Bank of Jersey City, introduced him to Flaherty at his office in Miami on November 14, 1968. Flaherty asked if the bank would open a custodial account which would be identified by a number so that his name would not be associated with the account.

Clum advised that the bank could open such an account. Flaherty then opened a brown attache case which contained $281,000 in municipal bearer bonds and $242,897 in currency, for a total of $523,897. On many of the bearer bonds the interest coupons had not been clipped since 1966. The accumulated uncollected interest was about $13,000. On September 12, 1969 Flaherty returned to Clum's office, this time in the company of Whelan. Flaherty introduced Whelan and said he wanted to open a similar numbered account in which his name would not be disclosed. Whelan had in his possession municipal bearer bonds of a face amount of $502,000. A numbered custodial account was opened for him. Flaherty instructed the bank to transfer bonds of an equivalent amount of $45,000 from his account to Whelan's. Thereafter on another occasion Whelan and Flaherty came to the bank with their wives and executed agreements whereby each of them and their respective wives would have the right to add to or withdraw from the other's account. On February 2, 1970 Whelan deposited $35,000 in currency in his numbered account and Flaherty deposited $40,000 in currency in his numbered account. On May 13, 1970 Whelan and Flaherty each deposited $30,000 in currency in their respective numbered accounts.

In late May or June, 1970, after the federal grand jury investigation of Hudson County and Jersey City had begun, Flaherty called Clum and said he wanted to close both accounts. He told Clum he would send Atkinson, a Jersey City police sergeant, to Miami to pick up authorizations for his and Whelan's signatures. Atkinson went to Florida, picked up the authorization forms, returned to Jersey City and obtained the signatures of Whelan and Flaherty. He returned to Florida on June 12, 1970 with a large suitcase and the executed authorizations. Clum delivered to Atkinson from Flaherty's account $571,000 of face value municipal bearer bonds, a check on principal cash in the amount of $30,025 and a check representing accumulated income of $13,270.36, or a total of $614,295.36. From Whelan's

account he delivered municipal bearer bonds in face amount of $577,000, a check drawn on principal cash in the amount of $35,025, and a check representing accumulated income of $6,112.94 or a total of $618,137.94. The four checks totaling $84,433.30 had not been negotiated when Clum testified on June 22, 1971.

Manning's testimony connected Flaherty's and Whelan's out of state bank accounts with the conspiracy. But aside from that testimony the existence of large and unexplained amounts of cash and bearer bonds simultaneously with the offenses and the efforts at concealment provide an ample nexus with the conspiracy. *United States v. Chaney, supra; United States v. McKenzie, supra; United States v. Jackson, supra; United States v. Howell, supra.* Indeed the efforts at concealment of the cash hoards were, as alleged in Count II of the indictment, for the purpose of hiding and concealing the purposes of and acts in furtherance of the conspiracy.

(3) The Cash Given by J. V. Kenny to J. J. Kenny

The immunized defendant J. J. Kenny testified that on February 3, 1971 after the indictment, and at a time when he had broken with the organization headed by J. V. Kenny, and before he began cooperating with the Government, he met with J. V. Kenny at Newark Airport and asked J. V. Kenny for $50,000. He told J. V. Kenny that he needed this sum to hire investigators and accountants.

"Q. Did you tell him why you wanted to hire investigators and accountants?

A. Yes, I told him I needed the money and I wanted to spread it to a fellow by the name of Frank Manning." (Tr. 1096-97)

Three days later J. J. Kenny received a message from someone named Pandolphi, telling him to go to a garage. He went to the garage and Pandolphi gave him $50,090 in currency. Thereafter he began cooperating with the Government and he turned the money over to the *United States Attorney.*

Each bill was marked,, and the $50,090 was offered and received in evidence. Frank Manning, of course, is the other immunized co-defendant. J. J. Kenny testified that he discussed with J. V. Kenny the use to which the money was to be put.

"The Witness: The purpose was to hire investigators, accountants, to discredit Mr. Manning.

Q. Was there any discussion as to why you wanted to discredit Frank Manning?

* * *

The Witness: The discussion was to discredit Mr. Manning. He was one of the defendants at the time.

Q. Did you have any discussion with Mr. John V. Kenny as to why Manning should be discredited?

* * *

The Witness: The discussion was that he was the party that we had to discredit." (Tr. 1116-1118)

The appellants urge that the admission of the foregoing testimony and evidence was grounds for a mistrial. They contend that it was perfectly proper for J. J. Kenny, in connection with the preparation of his defense to the indictment, to hire "investigators and accountants" to discredit Manning, and that it was perfectly proper for J. V. Kenny to give J. J. Kenny $50,090 for this purpose. The evidential use to which the Government put the funds, they contend, somehow infringed the right of J. J. Kenny and J. V. Kenny to prepare a defense. But neither Kenny is before us advancing this contention, and the prejudice, if any, must have been to the appellants before us for us to consider it.

The issue is whether the testimony was properly admissible against anyone, since on the record in the district court it is clear that the objections made on behalf of the appellants were to any admission of the evidence. There was no request for a limiting instruction to the effect that the

testimony and the currency could only be considered against some defendants.[7]

It is clear that the furtive transfer of $50,090 in currency from one conspirator to another conspirator for the purpose of discrediting a potential government witness certainly was evidence of consciousness of guilt on the part of the two defendants who participated in the transactions, and thus was admissible against the defendant J. V. Kenny. Next, the ready availability of a $50,090 hoard of currency was highly corroborative of the testimony of J. J. Kenny that the conspirators had extorted millions of dollars of currency which they secreted for their own use. Thus the evidence corroborated his testimony about the operation and success of the system which he described. As such it was admissible on the conspiracy counts against all the conspirators. Finally, the ready availability to one of the conspirators of $50,090 in cash and its transfer to another conspirator at a time shortly after the period during which the conspiracy is alleged to have continued,[8] as with other evidence of large unexplained hoards of currency, tended to establish the offenses charges. *United States v. Chaney, supra; United States v. McKenzie, supra; United States v. Jackson, supra; United States v. Howell, supra.*

Moreover the clandestine transfer of $50,090 in currency from one conspirator to another certainly suggests an effort to conceal its existence. Appellants urge that the only possible construction which may be placed on the testimony is that the money was for legitimate pre-trial preparation by J. J. Kenny. Arguably that was the case, but the circumstances suggest Judge Learned Hand's aphorism,

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[7] At the time J. J. Kenny gave the testimony from which the excerpts quoted above were taken defendant J. V. Kenny had not been severed.

[8] Count II alleges that the conspiracy began on or about November 1, 1963 and continued up to and including the date of the indictment.

"[t]here may be honor among thieves, but there is no maudlin munificence." *United States v. Compagna*, 146 F.2d 524, 530 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

Testimony about the $50,090, and the currency, were properly admitted.

(4) The Investments in C.E.W. Corporation Made By J. J. Kenny with Sternkopf's Help.

Sternkopf in particular claims that it was error to admit evidence that he assisted J. J. Kenny in making a concealed investment in C.E.W. Corporation. To put that objection in context it should be recalled that there is other evidence connecting Sternkopf to the conspiracy as early as October 1966. See p. 25 *supra*. Moreover before the evidence now complained of was admitted J. J. Kenny had testified about specific extortive transactions involving J. Rich Steers Corporation in which Sternkopf was a participant. Early in 1967, while Sternkopf was the Vice Chairman of the New Jersey Turnpike Authority, Galano, of the Steers firm, told J. J. Kenny he had been to see J. V. Kenny about obtaining a ten million dollar contract with that Authority, that he was interested in turnpike work, and that J. J. Kenny was to see if he could get it for Steers. J. J. Kenny met with Sternkopf and they agreed the Turnpike Contract was worth $50,000.00. J. J. Kenny then met with Galano and Rau, the president of Steers, and negotiated for a $50,000 kickback. Steers got the job and beginning in January 1968 paid the money in installments. One half of each installment was paid to Sternkopf and the other half to Stapleton, the treasurer for the system. Though the payments were made in 1968, Sternkopf's participation began in early 1967. The C.E.W. transaction took place in 1967. J. J. Kenny told Sternkopf that he had some "cash" he wanted to invest. Dooley, J. J. Kenny's brother-in-law, had succeeded Sternkopf as Clerk of the Hudson County Board of Chosen Freeholders on Sternkopf's recommendation. J. J. Kenny told Sternkopf he wanted Dooley to act as his agent in the investment. He gave Dooley $65,000 in currency and

a $16,000 check which he had obtained from a friend in exchange for $16,000 in currency. A property in South Jersey was purchased in the name of "C.E.W. Coporation" with Clarence Sprinkle, Edward Dooley and William Sternkopf disclosed principals. Dooley, however, was a nominee for J. J. Kenny, because, as Kenny declared, "I couldn't show that kind of cash." (Tr. 1079). Sternkopf made the arrangements, transmitted the cash and the $16,000 check for purposes of closing and received a twenty per cent interest in C.E.W. without making any investment.

Sternkopf would have us hold that the cash invested in C.E.W. was not sufficiently connected with the conspiracy, and improperly tied him into admitted extortions by J. J. Kenny. There was, however, ample evidence that in 1967 Sternkopf was a knowing participant in the system and in the efforts of its members to secrete the proceeds of their joint efforts.

When he took the stand in his defense Sternkopf insisted that J. J. Kenny was not a principal in C.E.W., and that he was merely aiding Dooley, a legitimate businessman. The J. J. Kenny version differs. It made Sternkopf a knowledgeable participant in efforts to conceal the fruits of the conspiracy. The conflict between the two versions was for resolution by the jury.

The evidence of concealed wealth was in each instance properly admitted.

B. The Di Feo Testimony

J. J. Kenny testified, without objection, that Di Feo Buick sold tires and cars to Hudson County and to Jersey City and that the owner, Sam Di Feo made kickbacks to him which, pursuant to the arrangements of the system, he turned over to Stapleton. (Tr. 1007-8) Di Feo, called by the Government, demanded and received immunity. Without objection he testified that he gave cash kickbacks to J. J. Kenny on cars sold to Hudson County, on cars sold to Jersey City to Murphy, and on cars ordered by Kunz for the Jersey

City Sewerage Authority to Flaherty. Still without objection he testified:

"Q. In 1969 what position, to your knowledge, did Fred Kropke hold in Hudson County?

A. He was the Chief of Police for the County.

Q. Did there come a time when you had any dealings with him in reference to some police cars for the Hudson County Police Department?

A. Well, he ordered ten police cars and I delivered the police cars. After that I had to give him two other cars, one was for himself and one was for Captain Robbins.

* * *

"Q. Did the defendant Kropke give you any instructions as to the bill for the Datsun for himself and the Oldsmobile for Captain Robbins?

A. He instructed me to bill these things to the County.

Q. Did he tell you how to bill it to the County?

A. As police cars." (Tr. 2103-04)

The Government then offered Exhibit 2165, the invoice to the County for the two cars falsely described as Buick specials. For the first time the defendants objected to the admission of the exhibit on grounds of relevancy. The objection was overruled and the invoice received in evidence. Di Feo then testified without objection:

"Q. Did Chief Kropke tell you why he wanted the invoice filled out that way?

A. So the County could pay for both cars." (Tr 2105)

The invoice, amounting to $5,327.80, was paid by the county.

There was no request for any limiting instruction at the time of the testimony, and no objection to the testimony. On appeal several defendants urge plain error. Fed. R. Crim. P. 52.

We see none. Clearly the kickback testimony was proof of the existence of the conspiracy alleged in Count II. These

were crimes of extortion or bribery under the laws of the State of New Jersey. The testimony with respect to the false invoices for cars delivered to Kropke and Robbins did not, technically, establish the offense of extortion or bribery under New Jersey law, since Di Feo was paid by the County. The district court recognized as much when at the end of the case it charged:

> "Ladies and gentlemen, my attention has been directed to the fact that I said the property in question here was money and in the case of Di Feo automobiles. Upon giving further thought to this I will eliminate 'automobiles,' because I do not recall any testimony of an instance where Mr. Di Feo didn't get paid for the automobile. Regardless of where the automobile went afterwards the County paid for it, but the automobile wasn't extorted from him. There is evidence that money was extorted from him." (Tr. 6833).

Kropke was a member of the official family who owed his position as Chief of the Hudson County police to J. V. Kenny. He was deeply involved in J. V. Kenny's efforts to conceal the cash loot of the conspiracy. He was in the position to perpetrate the venal fraud described in the Di Feo testimony only because the system of which he was a part had diverted the administration of county government to its private ends. Even if the Di Feo-Kropke transaction is regarded as a separate sub-conspiracy it is adequately connected to the one grand conspiracy in which all the defendants joined under the leadership of J. V. Kenny. *Blumenthal v. United States, supra.*

Moreover, against Kropke, the evidence, even if considered not a part of the overall conspiracy charged, was admissible, within the discretion of the trial court, as proof of motive, opportunity, intent, plan, knowledge and absence of mistake. *See* Rule 4-04, *Proposed Rules of Evidence for the United States District Courts* and Magistrates (1971); *United States v. Hamilton*, No. 71-1400 (3d Cir., filed Feb.

14, 1972); *United States v. Weiler*, 385 F.2d 63 (3d Cir. 1967); *United States v. Klass*, 166 F.2d 373 (3d Cir. 1948). The appellants can hardly claim there was an abuse of such discretion when by failing to object they never presented the issue to the district court.

Finally, even if the evidence were not properly admissible against Kropke, and we have held otherwise, its admission against him, with no request for a limiting instruction from the remaining defendants, is as to all of them at worst harmless error, Fed. R. Crim. P. 52(a), rather than plain error. Rule 52(b).

IV. Contentions Addressed to the Government's Cross Examination of Defense Witnesses

The appellants contend that several prejudicial errors took place during the Government's cross examination of defense witnesses.

A. Use of Suppressed Materials

We have referred heretofore, to the fact that the Government, rather than disclosing the contents of affidavits used to obtain search warrants, agreed that it would make no use of the materials seized in its affirmative case. The searches and seizures were made at the offices of Stapleton and Kropke. Both took the stand and testified. Both were confronted on cross examination with the seized materials in order to impeach their direct testimony. Both acknowledge that the seized evidence could, despite the Government's consent to suppression, be used for impeachment purposes. *Harris v. New York*, 401 U.S. 222, 226 (1971); *Walder v. United States*, 347 U.S. 62, 65 (1954). Both now contend that their direct testimony was in no way impeached by the seized evidence and that its use was therefore improper. The record discloses, however, that the testimony of each was substantially misleading and that the use made of the seized evidence was in the case of both properly impeaching. Moreover in Stapleton's cross examination the first reference to the seized materials was vol-

unteered by him. There was no error in the use made of the suppressed materials on cross examination.

B. The Larner Report

A former Governor of New Jersey, Robert B. Meyner, testified as a character witness for Sternkopf. He testified as to Sternkopf's reputation for honesty, integrity and veracity. On cross examination he insisted he had never heard anything bad about Sternkopf and he volunteered that he had him checked out quite throughly before appointing him, on the recommendation of J. V. Kenny to the New Jersey Turnpike Authority. Mr. Meyner was then confronted with sections of a report on an investigation into the municipal affairs of Jersey City made in 1954 and commonly known as the Larner Report. Prepared at the order of the Superior Court of New Jersey, it reflected quite adversely upon Sternkopf's performance as the supposedly independent City Auditor. Sternkopf contends this kind of cross examination of a character witness was impermissible. We have held otherwise. *United States v. Polack*, 442 F.2d 446, 477 (3d Cir. 1971), *cert. denied*, 403 U.S. 931 (1971). The scope of cross examination was within the sound discretion of the trial court. That discretion was not abused here. The cross examination went to Mr. Meyner's knowledge of Sternkopf's reputation and to Mr. Meyner's standard of good repute.

C. Krope's Financial Condition

On his direct examination Kropke admitted delivering the attache case full of cash from J. V. Kenny to Brill. *See* p. 25 *supra*. He admitted that he attempted, after the grand jury investigation was underway, to return to Schuster of Ashland Oil $9,000 of a $10,000 payment which had been obtained from Ashland, acting at the direction of Wolfe. In these transactions, he contended, he was an innocent and unknowledgeable participant. He ended his direct testimony by asserting that he never took a dollar from any of the contractors doing business with Hudson County. He

complains on appeal that he was cross examined about his financial worth and his expenditures and that in such cross examination the Government made use of his income tax returns. The returns were used only to refresh his recollection as to his reported income, and no claim was made that they were false. The cross examination was proper. Kropke, holding a trusted appointive law enforcement position in a governmental apparatus which, the evidence disclosed, had been largely diverted from the purpose of public service to that of private gain, had participated in the efforts of some of the co-conspirators to secrete the loot, and had participated in the efforts of others, when the grand jury investigation was in progress, to return some of the extorted funds to Ashland Oil Company. In the face of such evidence it was proper for the court to permit the Government to test the credibility of his protestations of non-participation by seeking to establish the sources of his expenditures during the years in question. The bounds of such cross examination was a matter for the discretion of the trial court. *United States v. Greenberg*, 419 F.2d 808 (3d Cir. 1971). No abuse of that discretion appears in this record.

D. The Court's Refusal to Recall a Government Witness

Appellant Murphy contends that it was error for the court to refuse to recall the witness Manning, at the end of the case, nine days after he had completed his testimony, for further cross examination. The alleged purpose of the additional cross examination was to attack Manning's credibility by showing that he had been the indirect recipient of money from Girard Engineering Co., one of the extortion victims. The documents upon which this cross examination was proposed to be based were available to counsel at the time of the original cross examination. In that cross examination the credibility of Manning, the immunized defendant and admitted co-conspirator was attacked literally for days. The scope of cross examination

on credibility issues was within the discretion of the trail court. The privilege of recross examination *a fortiori* ". . . lies within the trial court's discretion." *United States v. Stoehr*, 196 F.2d 276, 280 (3rd Cir.), *cert. denied*, 344 U.S. 826 (1952).

We have considered each other reference to alleged improper cross examination or limitation on cross examination asserted by any defendant, and in the light of the record we find no abuse of discretion with respect to the permitted scope of examination, and no error.

V. Sufficiency of the Evidence

The only appellants who contest the sufficiency of the evidence to support the jury verdict are Kunz and Kropke. We have heretofore in other context discussed the evidence connecting Kropke to the conspiracy. *See* p. 40 *supra*. That evidence looked at with a view most favorable to the Government was sufficient to present a jury question and to support the verdict on which Kropke was convicted. *United States v. Alper*, 449 F.2d 1223, 1227 (3rd Cir. 1971); *United States v. Carlson*, 359 F.2d 592, 597 (3d Cir. 1966). Measured by the same test the evidence connecting Kunz to the conspiracy, though concededly not as strong as that tying in the other defendants was also sufficient. Once the conspiracy is established, as here it was abundantly, only slight evidence is necessary to support a jury verdict that an individual defendant was a member. *United States v. Addonizio*, 449 F.2d 100, 102 (3d Cir. 1971); *United States v. Weber*, 437 F.2d 327, 336 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971); *United States v. Bey*, 437 F.2d 188, 192 (3d Cir. 1971).

From July 1, 1965 to July 1, 1969 Kunz was Director of the Department of Public Work of Jersey City. All public works contracts were supervised by his department. Di Feo testified that Kunz ordered the cars for the Jersey City Sewerage Authority on which he paid Flaherty a 10%

kickback. The evidence established that on every public works contract let by the Public Works Department a kickback was exacted. The witness Dolan testified that when he became Chief Engineer of that Department Kunz told him that he was not to issue plans and specifications to any contractors without prior clearance from Murphy (Tr. 3246-48). Even though Dolan believed it was his function as Chief Engineer to prequalify contractors, he followed Kunz's instructions. The evidence established that Murphy's pre-qualification consisted of the exaction of an agreement upon a 10% kickback. Kunz asserts that none of the above evidence establishes his knowledge of or participation in the conspiracy. But it is established in the record that neither Kunz nor any other of the defendants would have been in the public positions which they held without the approval of the system's head, J. V. Kenny. In 1969 Kunz was promoted from Director of the Department of Public Works to Business Administrator. After it was public knowledge that the federal grand jury was investigating Jersey City and Hundson County Kunz, the City Business Administrator, called Dolan to his office and this conversation ensued:

> "The Witness [Dolan]: Mr. Kunz asked me to come down to his office, which I did do. We discussed several aspects of City business and then he asked me if I had heard the latest about Mario Gallo.
> I said to him, 'No, what is the latest about Mario Gallo?'
> He said, 'They found him with a rope around his neck, the same thing could happen to you or to anyone else who talks about what is going on in Jersey City.'" (Tr. 3326).

We cannot say that the foregoing evidence, looked at most favorably to the Government, does not support the jury verdict against Kunz. *See United States v. Alper, supra.* at 1227.

VI. The Suppression Motion At Trial

We have discussed heretofore *supra*, P. 38, the contention that a warrant search of the offices of Kropke and Stapleton was not supported by an adequate warrant. At trial the defendant Stapleton moved to suppress the testimony of the witnesses Schuster and Roetman on the ground that it was the fruit of an illegal search. Fed. R. Crim. P. 41(e)(4); *Wong Sun v. United States*, 371 U.S. 471 (1963). The court heard argument on the motions and declined to hold an evidentiary hearing.

Schuster, an employee of Standard Bithulitic, a division of Ashland Oil Co., appeared before the federal grand jury on September 23, 1970 pursuant to a subpoena. He had not previously been in touch with any government agent. His testimony on September 23, 1970 was limited to the structure of Standard Bithulitic and Warren Brothers, and to the indentity of various corporate officers.

On October 7, 1970 Kropke appeared at Schuster's office, identified someone, falsely, as Wolfe, and attempted to see Schuster for the purpose of returning to Schuster $9,000 out of $10,000 which had been extorted from Schuster's company, and of explaining that the "dinner tickets" which the company purchased were only $100 each, not $1,000 each. He saw Schuster's secretary, Roetman, made known the purpose of the call, but since Schuster wasn't available, did not deliver the money. The money later was seized in Stapleton's office.

Prior to October 8, 1970 Schuster gave the United States Attorney the information about Kropke's approach. (Tr. 2526, 2530, 2537). The affidavit in support of the search warrant for Stapleton's office is dated October 8, 1970. (Appellants' Appendix 265). The warrant issued on October 8, 1970 (Appellants' Appendix 267) and was executed the same day. Thereafter on November 11, 1970 Schuster appeared before the grand jury and testified about the conspiracy.

The trial court declined to hold an evidentiary hearing because rather than Schuster's and Roetman's testimony being the fruit of the search it was clear in the record that the search was the fruit of the information disclosed, prior thereto, by Schuster. (Tr. 2556-63). The exclusionary rule operates on the fruits of the search, not the seeds.

VII. The Trial Court's Attitude

Appellant Murphy, in particular, and all of the appellants to some degree, assert that the trial judge throughout the trial manifested by his attitude toward defense counsel such extreme hostility and prejudice as to deprive them of a fair trial. From our trial judges we require basic fairness. We desire equanimity. We cannot expect perfect sanctity. No record of over seven thousand pages of a hard fought trial has ever been created in which, removed from the overall context, an appellate court could not isolate occasional indications of impatience or even irritability. This entire record is remarkably free from such indications, and to the extent they do exist they show an even handed effort on the part of the trial court to keep both the government attorneys and the defense attorneys within appropriate bounds. This was a long and hard fought trial before a sequestered jury. The court's efforts to prevent its undue prolongation were proper. *See, e.g., United States v. Murray*, 445 F.2d 1171, 1176 (3d Cir. 1971) and cases cited. The incidents of which the appellants, especially Murphy, complain, were directed principally to that end. The entire record discloses that the appellants, including Murphy, received a basically fair trial.

VIII. The Government's Comments During Summation

The appellants complain that a part of the Government's summation was improper. The part complained of reads:

> "The first count of this indictment charges that from at least as early as November 1963 the defendants now

on trial before you and the other defendants who were severed and other people who are unknown to the Grand Jury entered into a combination, kind of system, under which contractors, engineers, suppliers, anybody who wanted to do business in Jersey City or Hudson county was required to pay tribute, to kick-back. You have seen during the course of this trial a number of contractors take the witness stand and testify to exactly that. You have seen two men who were part and parcel with these other men at one time, and they were not talking about them the way they talked about them in the past few days several years ago when they were occupying the adjoining offices. You have seen them take the stand and tell you what was going on, not in Runnymede but in Jersey City and Hudson County, and I suppose the most shocking thing of all about this trial is that in seven full weeks *you have not heard a single contractor take the stand, not a single engineer, not a single supplier take the stand and say, 'I did business in Jersey City, in Hudson County and I didn't have to kick-back.'* " (Tr. 6637) (emphasis added)

The Government witnesses testified that under the system of which they and the defendants were part *every* contractor doing business with the city had to kick back 10% of the contract price. Numerous contractors and suppliers corroborated this testimony by proof of kick backs they made. The defendants were in a position to know of other contractors who did business with the city, and these contractors were certainly within reach of the court's process. None were called. The comment on their absence was appropriate:

". . . The rule even in criminal cases, is that, if a party has it particularly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the pre-

sumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893).

See also United States v. Restaino, 369 F.2d 544, 547 (3d Cir. 1966); *United States v. Lowe*, 234 F.2d 919 (3d Cir. 1956), *cert. denied*, 352 U.S. 838 (1956).

IX. The Court's Charge

One or more of the appellants urge that the court's charge was deficient in one respect or another. Most of these contentions were not called to the attention of the trial court after the charge and before the jury retired to deliberate and hence may not be assigned as error here. Fed. R. Crim. P. 30. Other matters were called to the trial court's attention and were in fact corrected. *See, e.g.*, p. 35 *supra* dealing with Di Feo's testimony.

Kropke did take exception to the trial court's definition of extortion under 18 U.S.C. § 1951. The instruction given reads:

> "The term 'extortion' means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right. The term 'fear', as used in the statute, has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a business or of a threatened loss.
>
> * * *
>
> Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear. You will note that extortion as defined by Federal Law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance the offense of extortion is committed." (Tr. 6773-74).

Kropke's objection is that the quoted instruction defines Hobbs Act extortion disjunctively; that is, obtaining money or property either by use of fear or under color of official right.

In *United States v. Addonizio*, 451 F.2d 49 (3d Cir. 1971), which also involved extortion by public officials, the case was submitted to the jury only on a use of fear theory. It has been held that the "under color of official right" language may have no applicability to extortionate acts committed by private individuals. *Bianchi v. United States*, 219 F.2d 182, 192 (8th Cir. 1955), *cert. denied*, 349 U.S. 915 (1955). But while private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right. The term "extortion" is defined in §1951(2):

> "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress. *See, e.g. United States v. Nardello*, 393 U.S. 286, 289 (1969); *United States v. Sutter*, 160 F.2d 754, 756 (7th Cir. 1947); *State v. Begyn*, 34 N.J. 35, 167 A.2d 161 (1961); *State v. Weleck*, 10 N.J. 355, 371 (91 A.2d 751, 759-60 (1952). The disjunctive charge on §1951 extortion was correct.

Appellant Kunz complains that the court did not in its charge sufficiently marshal the evidence applicable to him. He did not request that this be done, undoubtedly because his attorney did so skillfully, presenting the evidence against him in its most favorable light.

X. Sternkopf's Sentence

Sternkopf contends that the $20,000 fine imposed on him was improper because the sentence was a general one and the maximum on any single court was $10,000.00. He cites no authority for this proposition. The maximum fine in a general sentence may be determined by aggregating the maximum under each valid count. *See e.g., Peoples v. United States*, 412 F.2d 5, 6 (8th Cir. 1969); *United States v. Woykovsky*, 297 F.2d 179, 181 (7th Cir. 1961), *cert. denied*, 369 U.S. 872 (1962); *Robles v. United States*, 279 F.2d 401, 407 (9th Cir. 1960), *cert. denied*, 365 U.S. 836 (1961). In *United States v. Rose*, 215 F.2d 617, 630 (3d Cir. 1954) we said "We are strongly of the opinion that it is highly desirable that the trial judge in imposing sentence on an indictment containing more than one count deal separately with each count." The affirmance should not be construed as any change in our view as to the desirability of separate treatment.

The judgments appealed from will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B
REQUESTS TO CHARGE FOR DEFENDANT FRED KROPKE

Request No. 18:

"18. It is requisite that there be confederacy in fact and that the act be done in execution of the conspiratorial project, and acts foreign to the common design are not within the principle."

Request No. 20:

"20. There has been testimony by a witness, Samuel DiFeo, in the case as to events and invidents involving the defendant, Fred Kropke, which are not set forth nor included with the corners of the indictment, and for which the defendant, Fred Kropke, is not being tried. This proof is being offered by the Government in an attempt to show a common scheme or plan which would indicate that the defendant, Fred Kropke, is guilty of the crimes charged in the indictment presently being tried before you.

"If these events and incidents do not convince you beyond a reasonable doubt that they show a common scheme or plan which would indicate the charges in the present indictment, you must disregard them in your consideration of the defendant's innocence or guilt."

AMENDMENT IV–SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V–CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI–JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not

more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section–

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.
June 25, 1948, c. 645, 62 Stat. 793.

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, or uses any facility in interstate or foreign commerce, including the mail, with intent to–

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, §701(i) (2), Oct. 27, 1970, 84 Stat. 1282.